

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE DEPARTMENT OF VETERANS AFFAIRS

Lloyd R. Harr,

Petitioner,

v.

City of Edina,

Respondent.

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW, AND  
RECOMMENDATION ON  
BACKPAY AWARD**

This matter came before Administrative Law Judge Steve M. Mihalchick on remand from the Minnesota Court of Appeals to determine what backpay award is appropriate. The matter was presented on the prior record and additional stipulated facts and both parties submitted written argument. The record in this matter closed on June 24, 1996, with the receipt of the final reply briefs.

William L. Lucas, Harvey, Thorfinnson & Lucas, P.A., Marquette Bank Building, Suite 400, 6640 Shady Oak Road, Eden Prairie, Minnesota 55344, represents the Petitioner, Lloyd R. Harr. David J. Lauth and Mary B. Thomas, Dorsey and Whitney, 220 South Sixth Street, Minneapolis, Minnesota 55402, represent of Respondent, City of Edina (the City).

Notice is hereby given that, pursuant to Minn. Stat. § 14.61 the final decision of the Commissioner of Veterans Affairs shall not be made until this Report has been made available to the parties to the proceeding for at least ten days, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the Commissioner. Exceptions to this Report, if any, shall be filed with Bernie Melter, Commissioner, Department of Veterans Affairs, Veterans Service Building, 20 West Twelfth Street, St. Paul, Minnesota 55155-2079, telephone number (612) 297-5828.

**STATEMENT OF ISSUE**

What amount of backpay is required by Minn. Stat. § 197.455 to be paid to Petitioner for the period between Petitioner's suspension and his discharge from Respondent's employ.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

### **FINDINGS OF FACT**

1. Findings 1 through 16 of the Findings of Fact, Conclusions of Law, and Recommendation issued in this matter on December 5, 1994, are incorporated in this Recommendation by reference.

2. Harr was first informed of the need for him to select a panel member on December 14, 1990. He selected a panel member in September, 1991. No evidence has been introduced to show what efforts Harr made to select a panel member during the period between December, 1990, and September, 1991.

3. The panel member selected by Harr was unavailable to participate in the hearing until December, 1991. Exhibit 19, at 19. The hearing was held on May 4, 1992, and the panel issued its decision on June 19, 1992. Exhibit 20. The panel upheld the discharge of Harr as justified.

4. Harr's hourly wage at the time of his suspension was \$12.96. In January, 1991, that rate would have increased to \$13.48. Stipulation of the Parties, para. 23. Overtime was available, and was either paid at time-and-a-half or taken as compensatory time at a rate of 1.5 hours for each overtime hour worked. In the six months up to his suspension, Harr earned 39 hours of overtime. In 1989, he had earned 89 hours. T. 64-69; Exhibit 28. He took much of that as compensatory time and, so, was paid for nine hours of overtime in 1990 and 55 hours in 1989. Exhibit 23. Harr received contributions from the City to his PERA account at the rate of 4.48 percent of gross earnings.

5. In addition to hourly wage, the City made health and life insurance contributions of \$195.00 per month in 1990 and \$215.00 per month in 1991. Respondent ceased paying the insurance premiums for Petitioner on September 1, 1990.

6. During July and August, 1991, Harr earned \$1,770.00 as a carpenter. Stipulation of Facts, at 1. From December, 1991, to February 1, 1992, Harr earned \$2,887.50. *Id.* From March 30, 1992, to June 19, 1992, Harr earned \$6,277.50. *Id.* at 2. The parties have stipulated that such earnings must be offset from any claim for back pay.

Based on the foregoing Findings of Fact, the Administrative Law Judge makes the following:

## CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Veterans Affairs have jurisdiction over the subject matter of this hearing, pursuant to Minn. Stat. §§ 14.57 and 197.481.

2. Proper notice of the hearing was timely given, and all relevant substantive and procedural requirements of law or rule have been fulfilled and, therefore, the matter is properly before the Administrative Law Judge.

3. In Harr v. City of Edina, 541 N.W.2d 603 (Minn. App. 1996), the Court of Appeals determined that Petitioner's suspension of July 2, 1990, constituted a removal and that Petitioner was not afforded a veterans preference hearing prior to removal as required by Minn. Stat. § 197.455. The Court of Appeals determined that Petitioner was entitled to backpay, but that the doctrine of laches should be applied to reduce the backpay award because of Petitioner's failure to appoint a member to the hearing panel in a reasonably prompt time.

4. Respondent's argument that Petitioner should receive no backpay for the period of suspension (July 2, 1990, to October 4, 1990) because he was unable to drive during that period has already been rejected by the Court of Appeals. The Court of Appeals decided the issue by determining that the date of removal was July 2, 1990.

5. Petitioner should reasonably have appointed his hearing panel member, ready to proceed, by February 14, 1991, a period of 60 days from when he was notified and requested to appoint a panel member. Had Petitioner done so, the hearing panel's decision would reasonably have been rendered within the same six-month time frame, or by August 14, 1991. Petitioner is therefore entitled to backpay for the period of July 2, 1990, to August 14, 1991.

6. Petitioner is entitled to overtime at the rate he was earning it for the first half of 1990. That was 39 hours for the first half, or three hours per pay period. The City argues that he should be paid only at the rate he was most recently paid for overtime because by 1990 Petitioner had developed a routine of usually taking compensatory time off instead of the pay for the overtime. That, of course, cannot work retrospectively; we can't give him the days off now. He can only be compensated for the overtime in cash. Thus, the amounts that Petitioner was actually paid for overtime from 1988 to 1990, as well as the amounts other employees were paid for overtime during those years, are irrelevant in determining how much overtime Petitioner would have earned, except that all the numbers show some general consistency over that period. During 1990, Petitioner would have averaged three hours of overtime per pay period, times \$12.96 per hour, times 1.5, or \$58.32 per pay period. During 1991, at \$13.48 per hour, he would have averaged \$60.66 per pay period in overtime earned.

7. During the period for which backpay is to be awarded, Petitioner worked three weeks and earned \$1,770.00. That amount should be deducted from the pay award.

8. Petitioner is entitled to total back wages of \$30,901.76 as shown on the attached spreadsheet labeled Sheet1. He is also entitled to payment for insurance contributions that would have been made during the period of \$2,695.00 and PERA contributions that would have been made by the City of \$1,384.40, for a total award of \$34,981.15. The interest to June 30, 1996, on the total award is \$11,597.05 as shown on the attached Sheet1. Petitioner is entitled to be paid additional interest of \$5.75 per day on the total award until paid in full.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

### **RECOMMENDATION**

IT IS RESPECTFULLY RECOMMENDED that the Commissioner of Veterans Affairs order that Respondent pay Petitioner a total award of \$34,981.15, consisting of wages of \$30,901.76, insurance contributions of \$2,695.00 and PERA contributions of \$1,384.40, together with interest at 6 percent per year in the amount of \$11,597.05 to June 30, 1996, plus \$5.75 per day thereafter until paid in full.

Dated this \_\_\_\_ day of July, 1996.

\_\_\_\_\_  
STEVE M. MIHALCHICK  
Administrative Law Judge

### **MEMORANDUM**

Respondent asserts that Petitioner cannot receive backpay for the period that he did not have a valid driver's license. The Minnesota Court of Appeals decided that the terms of Petitioner's suspension constituted a discharge. The Court of Appeals cites Johnson v. Village of Cohasset, 116 N.W.2d 692 (Minn. 1962) and noted that the case holds that "an honorably discharged military service veteran who has been suspended without pay from public employment is entitled to an award of back wages and benefits from the date of his suspension until the date of the decision of the veterans preference hearing board, plus interest." Harr v. City of Edina, 541 N.W.2d 603, 605-606 (Minn.

App. 1996). The Recommendation issued by the Judge in this matter fully discussed why this matter was different and that reasoning was rejected.

The only ground for precluding full recovery of backpay identified in the Court of Appeals decision is the doctrine of laches. Had the Court of Appeals decided no backpay is appropriate during the period Petitioner lacked a driver's license, the Court could have said so, or determined the termination occurred when Petitioner had his license reinstated. Neither option was exercised by the Court of Appeals. The ALJ concludes that the Court of Appeals has decided this issue in favor of Petitioner and backpay can be awarded while his driver's license was revoked. Had things been done correctly, the City would have given Petitioner notice of removal and right to a hearing at the time they, in essence, sought to suspend him indefinitely. He would have continued to be paid until the hearing process was completed, whether he could do the job or not. The decision of the Court of Appeals and the damages calculated here return Petitioner to that position.

The doctrine of laches is identified by the Court of Appeals as applicable to this matter. Harr, 541 N.W.2d at 606. While the Court held that the backpay award must be reduced, the Court did not indicate by how much. Petitioner argues that unemployment and confusion over the process justifies not appointing a panel member until March 14, 1991. But that is merely suggestion and speculation by counsel. No evidence was offered as to why the delay occurred. Since Petitioner was not working, there was no impediment to him applying his full attention to the process. Since Petitioner was not receiving unemployment compensation or pay, there should have been motivation for speed in getting a hearing that could reinstate him to his position. The City could be expected to find a panel member fairly quickly. It just chose a labor representative who typically represents employers in labor matters. It is reasonable that an employee would take longer; but not nine months. The Petitioner could have received assistance from his union (as the City suggested in its letters) or from the County Veterans Service Officer. But Petitioner apparently did nothing. The statute allows 60 days to request a hearing; a similar period to appoint a member is reasonable. The Judge concludes that the hearing panel member should reasonably have been selected by Petitioner within 60 days of being advised of the hearing process.

Having concluded that the selection should have been made within 60 days, the further delay caused by Petitioner's panel member being unavailable would not, or should not, have occurred. The ALJ concludes that the time between the panel member being available and the date of the decision by the panel would have remained approximately the same, that is, six months. Therefore, the doctrine of laches limits backpay to the amount accruing prior to August 14, 1991.

There is a duty to mitigate damages where possible, but the burden to show lack of mitigation is upon the Employer. Henry v. Metropolitan Waste Control Commission, 401 N.W.2d 401 (Minn. App. 1987). Petitioner remained unemployed until about the middle of July 1991. He then worked for three weeks earning \$1,770.00. That amount should be deducted from the backpay award.

Respondent argues that no award for overtime is appropriate because Petitioner had worked less overtime nearer to his suspension and he took the overtime earned as compensatory time off in lieu of pay. This argument overlooks the fact that even compensatory time off has a monetary value that must be compensated due to the improper discharge of Petitioner. Respondent's action in terminating Petitioner eliminated any opportunity to take compensatory time in lieu of pay. An award of overtime pay is appropriate. Petitioner earned 89 overtime hours in 1989 and earned 39 hours of overtime through half of 1990. This consistent pattern of overtime supports an award of three hours of overtime per pay period during the backpay period.

The award for PERA contributions is determined by multiplying the gross earnings by the contribution rate of 4.48%. The health insurance award is based on premiums for the months Petitioner should have been paid. The amounts and dates of payment have been adopted from Petitioner's calculation. Brief of Petitioner, at 12.

S.M.M.

Sheet1  
Calculation of Damages  
Lloyd R. Harr  
July 2, 1990 to August 14, 1991

Payday	Base Pay	Overtime	Offset	Net Wages	Ins. Contrib.	PERA	Net Benefits	Total	Interest to 6/30/96
7/6/90	414.72	23.33		438.05		19.62	19.62	457.67	166.72
7/20/90	1036.80	58.32		1095.12		49.06	49.06	1144.18	414.16
8/3/90	1036.80	58.32		1095.12		49.06	49.06	1144.18	411.53
8/17/90	1036.80	58.32		1095.12		49.06	49.06	1144.18	408.90
8/31/90	1036.80	58.32		1095.12	195.00	49.06	244.06	1339.18	475.50
9/14/90	1036.80	58.32		1095.12		49.06	49.06	1144.18	403.63
9/28/90	1036.80	58.32		1095.12	195.00	49.06	244.06	1339.18	469.34
10/12/90	1036.80	58.32		1095.12		49.06	49.06	1144.18	398.36
10/26/90	1036.80	58.32		1095.12	195.00	49.06	244.06	1339.18	463.17
11/9/90	1036.80	58.32		1095.12		49.06	49.06	1144.18	393.10
11/23/90	1036.80	58.32		1095.12	195.00	49.06	244.06	1339.18	457.01
12/7/90	1036.80	58.32		1095.12		49.06	49.06	1144.18	387.83
12/21/90	1036.80	58.32		1095.12	195.00	49.06	244.06	1339.18	450.85
1/4/91	1036.80	58.32		1095.12		49.06	49.06	1144.18	382.56
1/18/91	1078.40	60.66		1139.06	215.00	51.03	266.03	1405.09	466.57
2/1/91	1078.40	60.66		1139.06		51.03	51.03	1190.09	392.44
2/15/91	1078.40	60.66		1139.06	215.00	51.03	266.03	1405.09	460.10
3/1/91	1078.40	60.66		1139.06		51.03	51.03	1190.09	386.96
3/15/91	1078.40	60.66		1139.06	215.00	51.03	266.03	1405.09	453.63
3/29/91	1078.40	60.66		1139.06		51.03	51.03	1190.09	381.48
4/12/91	1078.40	60.66		1139.06	215.00	51.03	266.03	1405.09	447.17
4/26/91	1078.40	60.66		1139.06		51.03	51.03	1190.09	376.00
5/10/91	1078.40	60.66		1139.06	215.00	51.03	266.03	1405.09	440.70
5/24/91	1078.40	60.66		1139.06		51.03	51.03	1190.09	370.53
6/7/91	1078.40	60.66		1139.06	215.00	51.03	266.03	1405.09	434.23
6/21/91	1078.40	60.66		1139.06		51.03	51.03	1190.09	365.05
7/5/91	1078.40	60.66		1139.06	215.00	51.03	266.03	1405.09	427.76
7/19/91	1078.40	60.66		1139.06		51.03	51.03	1190.09	359.57
8/2/91	1078.40	60.66	885.00	254.06	215.00	11.38	226.38	480.44	144.05
8/16/91	862.72	48.53	885.00	26.25		1.18	1.18	27.42	8.16
Totals	30931.84	1739.92	1770.00	30901.76	2695.00	1384.40	4079.40	34981.15	11597.05

Notes:

Assumes pay periods ends at payday.

PERA at 4.48% of Net Wages

Interest on Total x 6% /365 x number of days